Supreme Court, U.S.
FILED

No. 10-

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IN THE
Supreme Court of the United States

FIRST BANK,

Petitioner,

v.

DJL PROPERTIES, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GORDON R. BROOM
Counsel of Record
TROY A. BOZARTH
W. JASON RANKIN
HEPLERBROOM LLC
103 W. Vandalia Street
Suite 300
Edwardsville, IL 62040
(618) 656-0184
gordon.broom@heplerbroom.com

Counsel for Petitioner

231076

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

The question presented is whether *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a class action counterclaim under the Class Action Fairness Act, 28 U.S.C. § 1453(b)?

COMPLETE LISTING OF PARTIES

First Bank
DJL Properties, LLC
Jonathon E. Guthrie
Lisa M. Guthrie
Metro East Sanitary District
American Bottoms Regional Wastewater Treatment Facility
Land of Lincoln Securities
Village of Sauget
Raven Securities, Inc.
St. Clair County Trustee
VI Inc.

RULE 29.6 STATEMENT

First Bank is chartered in Missouri with its principal place of business in Creve Coeur, Missouri. First Bank's parent company is The San Francisco Company, which is wholly owned by First Banks, Inc. No publicly held corporation owns 10% or more of First Bank's stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The orders of the district court remanding the cases to state court (App., *infra*, 6a-17a) are not published in either the *Federal Supplement* or *Federal Reporter*, but are available at 2010 U.S. Dist. LEXIS 7204 and 2010 U.S. Dist. LEXIS 7700. The opinion of the court of appeals affirming the district court's ruling (App., *infra*, 1a-5a) is reported at 598 F.3d 915. The order denying rehearing and rehearing *en banc* (App., *infra*, 18a-19a) is not published in either the *Federal Supplement* or *Federal Reporter*, but is available at 2010 U.S. App. LEXIS 8950.

JURISDICTION

The court of appeals entered its opinion and judgment on March 24, 2010. The order denying Petitioner's petition for rehearing and rehearing *en banc* was entered on April 22, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; and 28 U.S.C. § 1453. App., *infra*, 20a-39a.

STATEMENT OF THE CASE

The issue in this case is whether this Court's holding in *Shamrock Oil v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a qualifying class action under 28 U.S.C. § 1453(b), the class action removal statute enacted as part of the Class Action Fairness Act of 2005 ("CAFA" or "Act"). The Seventh Circuit Court of Appeals, citing *Shamrock Oil*, declared that § 1453(b) does not allow counterclaim defendants to remove otherwise qualifying class actions to federal district courts because a counterclaim defendant is not a "defendant" under § 1453(b). The effect of the Seventh Circuit's holding is that plaintiffs whose claims satisfy the prerequisites for federal jurisdiction under CAFA may avoid federal court jurisdiction merely by bringing their class actions as counterclaims, even though the language of CAFA forecloses such maneuverings by class action plaintiffs. The panel's holding is inconsistent with both the text and purposes of CAFA.

A. Proceedings in State Court

Petitioner First Bank initiated its Complaint for Breach of Note and Guarantees against Respondent DJL Properties, LLC ("DJL) on May 12, 2009, in the Circuit Court of St. Clair County, Illinois, Case No. 09-L-238. On May 18, 2009, Petitioner First Bank filed a separate lawsuit in St. Clair County, Illinois to foreclose the relevant mortgage, Case No. 09-CH-506. Approximately four months later, without leave of court and without having filed an answer, DJL filed a Class Action Counterclaim against First Bank on October 20, 2009 in both the foreclosure action and the action based

upon breach of the promissory note. The Class Action Counterclaims were identical. The Class Action Counterclaims asserted state statutory and breach of contract claims. App., *infra*, 9a.

B. Proceedings in the District Court

On November 19, 2009, First Bank removed both lawsuits to the United States District Court for the Southern District of Illinois.[1] *See* App., *infra*, 9a. In its Notice of Removal, First Bank acknowledged the rule of *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941), where this Court construed the statutory predecessor to 28 U.S.C. § 1441 as limiting removal rights to "the defendant or defendants" and, thus, prohibiting plaintiffs/counterclaim defendants from enjoying removal rights. App., *infra*, 10a. First Bank, however, submitted that the express language of § 1453(b), enacted as part of CAFA, permits "any defendant," including a counterclaim defendant, to remove "a class action" to federal court. App., *infra*, 11a-12a, 15a. First Bank further argued that in *Shamrock Oil* the Court construed different language in a different statute and, thus, its holding did not bar the removal. App., *infra*, 10a.

1. Upon removal to the United States District Court of the Southern District of Illinois, the Complaint to Foreclose Mortgage was assigned Cause No. 09-cv-970-JPG, and was assigned to the Honorable J. Phil Gilbert for decision. The Complaint for Breach of Note and Breach of Guarantees was assigned Cause No. 09-cv 969-MJR, and was assigned to the Honorable Michael J. Reagan for decision.

Each case was remanded to state court in late January 2010.[2] The district court held that CAFA did not alter the rule of *Shamrock Oil* that only "the defendant," and not plaintiff/counterclaim defendants, may remove cases to federal court, even class action counterclaims that otherwise satisfy the requirements of CAFA. App., *infra*, 6a-17a. The district court stated, "When viewed with the legal landscape as it existed when CAFA was enacted and in the context of the removal statutes as a whole, the Court believes 'any defendant' is more likely to mean 'any of the defendants,' with 'defendants' being interpreted as it was in *Shamrock Oil*." App., *infra*, 15a. The district court concluded that it "can only interpret the laws as they are written." App., *infra*, 15a.

C. Proceedings in the Appellate Court

On February 5, 2010, First Bank filed petitions for leave to appeal to the Seventh Circuit Court of Appeals in each case.[3] *See* App., *infra*, 1a-5a. The Seventh Circuit had jurisdiction to review the remand orders of the district courts pursuant to 28 U.S.C. § 1453(c)(1). 28 U.S.C. § 1453(c)(1). First Bank's petition argued that

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2. Only Judge Gilbert's order to remand the case to state court contained an opinion. *See* App., *infra*, 8a-17a. Judge Reagan adopted the reasoning of Judge Gilbert's opinion and likewise ordered Cause No. 09-cv-969-MJR remanded to state court. *See* App., *infra*, 6a-7a.

3. The Complaint to Foreclose Mortgage was assigned Case No. 10-8008 in the Seventh Circuit. The Complaint for Breach of Note and Breach of Guarantees was assigned Case No. 10-8009.

§ 1453(b) expressly authorizes "any defendant" to remove qualifying class actions to federal court including class actions brought as counterclaims. App., *infra*, 2a, 38a. First Bank requested the Seventh Circuit to reverse the district court's remand orders and remand the case to the district court for further proceedings.

In its order,[4] the panel granted First Bank's petition for leave to appeal, "because the cases present an issue not yet resolved in this circuit." App., *infra*, 2a. The panel simultaneously issued its decision affirming the orders of the federal district court remanding these matters to the circuit court of St. Clair County, Illinois. App., *infra*, 1a-5a. The panel reasoned that the two appellate circuits that have held that counterclaim defendants may not remove class action counterclaims to federal court under CAFA, *Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008) *cert. denied, AT&T Mobility LLC v. Shorts*, 129 S.Ct. 2826 (2009); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007), were correct in so holding. App., *infra*, 3a. The panel noted that § 1453 says that a class action may be removed "in accordance with section 1446." App., *infra*, 3a. Because § 1446 identifies the procedures used to remove cases, and § 1441, which creates the general right of removal, states that

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4. In addition, because DJL filed the exact same counterclaims in each case, First Bank filed a Motion to Consolidate Consideration and Briefing of the Petition for Permission to Appeal. Though the Seventh Circuit did not issue a formal order granting the motion, on March 24, 2010, it issued a single order and opinion addressing both petitions for leave to appeal. App, *infra*, 1a-5a. Thus, Petitioner has filed this single Petition for Writ of Certiorari.

"defendants" may remove a suit, the panel reasoned consistent with *Shamrock Oil* that First Bank is not a "defendant" under § 1441 or § 1446. App., *infra*, 3a-4a. The panel further reasoned that the word "any" in § 1453 does not imply that "defendant" means something different in § 1453 than in either § 1441 or § 1446. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit Court of Appeals held that a party forced to defend a class action that is otherwise removable under CAFA cannot remove the case pursuant to § 1453(b) if it is a counterclaim defendant and not a defendant as defined in *Shamrock Oil*. App., *infra*, 5a. The panel's interpretation ignores both the language of § 1453(b) and the purpose for which CAFA was enacted. Moreover, its construction forecloses CAFA's protections to an entire class of defendants confronted with the types of class actions that Congress determined should be heard in federal courts. This creates a gaping loophole that Congress intended to prevent.

Although the courts of appeal that have confronted this issue are not split in their interpretations of § 1453(b), this Court should grant this petition because this Court has not decided this important issue and the Seventh Circuit's holding creates a loophole that raises a question of statutory construction of national importance. Plaintiffs' counsels from across the nation are increasingly aware of this loophole in CAFA's protections created by these incorrect rulings. Without guidance from this Court, the exact types of class actions that Congress deemed should be litigated in federal

court due to their abusive nature nonetheless will remain in state court merely because they are labeled as counterclaims. CAFA will become completely ineffectual. This Court, therefore, should grant review of the panel's decision.

A. The Seventh Circuit's Holding Is In Error Because the Class Action Fairness Act Expressly Authorizes Removal by Counterclaim Defendants.

The Seventh Circuit's judgment affirming the district court's remand orders is in error because it ignores the plain meaning of § 1453(b)'s terms. The rule articulated by this Court in *Shamrock Oil* should not operate to bar counterclaim defendants from availing themselves of federal jurisdiction over qualifying class actions granted by CAFA. The clear text of § 1453(b) and the factual findings made by Congress in enacting CAFA, when compared to this Court's construction of the statutory predecessor to 28 U.S.C. § 1441(a) in *Shamrock Oil*, indicate that *any* defendant should be able to remove certain class actions to federal court.

This Court in *Shamrock Oil* pronounced the general rule that only original defendants may remove a case to federal court. *Shamrock Oil*, 313 U.S. 100. However, *Shamrock Oil*, decided in 1941, should not operate to preclude counterclaim defendants from removing qualifying class actions under § 1453(b). *Shamrock Oil* did not broadly define "defendant" for all removal contexts; rather, it interpreted what the phrase "the defendant" meant when adopted by Congress to replace "either party" in an earlier version of § 1441(a). *See Id.*; *Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 340

(4th Cir. 2008) (Niemeyer, J., dissenting). The Court held that when Congress changed the removal statute to exclude "either party" and changed the language to "the defendant or the defendants," it sought to limit removal to defendants and did not extend it to a plaintiff/counterclaim defendant. *See Shamrock Oil*, 313 U.S. at 107; *Palisades Collections, LLC*, 552 F.3d at 341-342 (Niemeyer, J., dissenting). The Court also reasoned that the change in statutory text reflected Congress' desire to restrict removal jurisdiction. *Shamrock Oil*, 313 U.S. at 107. In contrast, Congress enacted § 1453 as part of the Class Action Fairness Act of 2005, and in doing so expressly intended to expand federal removal jurisdiction. Section 1453(b) states:

> A class action may be removed to the district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1453(b).

When construing statutes, courts are directed to "give words their plain meaning." *U.S. v. Jones*, 372 F.3d 910, 912 (7th Cir. 2004). Each word is to be interpreted and given effect so that none is rendered meaningless. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The panel ignored these canons of statutory construction when it equated the words "the defendant or the defendants" as discussed in *Shamrock Oil* and as used in § 1441(a) with the words "any defendant" in § 1453(b).

By it terms, § 1453(b) is addressed to "any defendant." 28 U.S.C. § 1453(b). "Any" is an expansive term, and one this Court consistently finds when read naturally means "one or some indiscriminately of whatever kind." *Palisades Collections, LLC*, 552 F.3d at 339 (Niemeyer, J., dissenting). When the word "'any' precedes a noun, the meaning of the noun is expanded." *Id.* As used in § 1453(b), the phrase "any defendant" expands the kinds of defendants that may remove an action. Section 1453(b), therefore, expands removal authority beyond the limits of § 1441(a)'s "the defendant" to "any defendant" joined as an additional defendant to a counterclaim, as well as any counterclaim defendant, as is Petitioner in this case. *Id.* Further, when it enacted CAFA, Congress was keenly aware of the expansive meaning courts ascribe to the word "any" when interpreting statutory text. *See U.S. v. Gonzalez*, 520 U.S. 1, 5 (1997).

The Seventh Circuit's limitation on the types of defendants to which § 1453(b) applies – only "the [original] defendant" – contradicts the statute by importing limitations that are not present in the text. Section 1453(b) states, "a class action may be removed to the district court of the United States" by any defendant. 28 U.S.C. § 1453(b). In contrast, the general removal statute for diversity cases, § 1441(a), states, "any civil action . . . may be removed by the defendant or defendants." 28 U.S.C. § 1441(a). Section 1441(a) imposes limitations on removal by restricting it only to "the defendant." *Id.* Section 1453(b), however, does not have this same limiting language. It simply states any defendant may remove a qualifying class action. In *Gladstone Realtors v. Vill. of Bellwood*, this Court held

that the statute at issue in that case did not restrict the class of plaintiffs that may assert rights under its terms because the statute itself did not contain any restrictions. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-103 (1979). Similarly, since § 1453(b) contains no restrictions on the sort of defendant that may remove qualifying class actions, it was erroneous for the panel to import such restrictions.

Moreover, § 1453(b) expressly permits "a class action" to be removed and § 1332(d)(1)(B) defines "class action" as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute . . . authorizing an action be brought . . . as a class action." 28 U.S.C. § 1332(d)(1)(B). "Any" class action, including class action counterclaims, are within the purview of CAFA's removal jurisdiction and the panel's decision improperly prevents removal of the class action counterclaim brought against First Bank.

The Seventh Circuit acknowledged that "any" modifies the word "defendant" in § 1453(b). Nonetheless, it maintained that "any" had no effect on the word defendant. App., *infra*, 4a. Rather, according to the panel, the word "any" as used in § 1453(b) merely eliminates the restrictions imposed by § 1441(b) that home-state defendants cannot remove causes of action. App., *infra*, 4a. The panel further noted that the second "any" in § 1453(b) only eliminated the application of the rule in *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245 (1900) that required defendants to unanimously consent to removal. App., *infra*, 4a. Thus, according to the Seventh Circuit, the inclusion of the word "any" in § 1453(b) eliminated the application of two long-standing rules that govern the application of the general removal statute.

This analysis is incompatible with the panel's finding that the use of "any" does not also render the holding of *Shamrock Oil* inapplicable to class action counterclaim defendants. According to the panel, the only long-standing rule that § 1453(b) did not alter was the rule this Court articulated in *Shamrock Oil* that permits only an original defendant to remove a case. In his well-reasoned dissent in *Palisades Collections, LLC v. Shorts*, the Honorable Paul V. Niemeyer examined the inconsistency created by this statutory interpretation. *Palisades Collections, LLC*, 552 F.3d at 339-340. He noted the same clauses that negate the application of these long-standing rules ought to be construed to "abolish *Shamrock Oil's* rule for CAFA purposes given that both *Shamrock Oil* and *Martin* were based on the exact same language in § 1441(a)'s predecessor statute." *Id.* He stated "[i]t seems implausible at best that the § 1453(b) language abolished the *Martin* rule while leaving untouched the *Shamrock Oil* rule, especially when both rules depended on the same language." *Id.*

The panel's holding was also based upon the interpretation of the word "defendants" in § 1441 and § 1446. The panel reasoned that if § 1453(b) allows counterclaim defendants to remove qualifying class actions, then § 1453(b), § 1441 and § 1446 are incoherent because the term "defendant" would have inconsistent meanings. App., *infra*, 4a-5a. This analysis, however, is an artificial barrier to interpreting § 1453(b) in accord with its plain meaning. Without question, § 1453(b) states that the removal of a class action is to be executed in accordance with § 1446. But, as Judge Niemeyer explained, § 1446 merely sets forth the procedure for removing cases and the reference to § 1446 in § 1453(b)

should not be construed as limiting the types of defendants that can remove class actions. *Palisades Collections, LLC*, 552 F.3d at 339-340.

Moreover, it is immaterial that § 1441 uses the phrase "the defendant or the defendants." Section 1441(a) provides the general rule for certain removals, stating that civil actions "of which the district courts of the United States have original jurisdiction, may be removed by *the* defendant or *the* defendants." 28 U.S.C. § 1441(a) (emphasis added). In contrast to § 1441(a), § 1453(b) provides a more expansive right to remove certain types of "civil actions" - class actions. It permits a class action to be removed to a district court "without regard to whether *any* defendant is a citizen of the State in which the action is brought, except that such action may be removed by *any* defendant without the consent of all defendants." 28 U.S.C. § 1453(b)(emphasis added). First Bank submits, as did Judge Niemeyer in his dissent in *Palisades Collection, LLC*, that § 1453(b) "expands removal authority beyond the limits of § 1441(a) so that it includes any defendant joined as an additional defendant to a counterclaim, as well as any counterclaim defendant." *Palisades Collection, LLC*, 552 F.3d at 339. Thus, the panel was incorrect in suggesting that "defendant" has a specific legal meaning such that if "defendant" includes counterclaim defendants, the term "defendant" would be interpreted inconsistently. Nor is it correct to suggest that interpreting § 1453(b) to include any type of defendant endangers the ability of Congress to understand what effect proposed language may have, or cloud the general public's understanding of the meaning of statutes. Instead, this interpretation gives effect to the

expansive meaning of "any" in § 1453(b). The panel's interpretation effectively changes the statutory text from "any" to "the," which is contrary to well-recognized rules of statutory construction.

B. The Seventh Circuit's Holding is Erroneous Because It Ignores the Purposes for Which CAFA Was Enacted.

Congress made several "Findings" that explained the need for the passage of CAFA. Class Action Fairness Act of 2005, Pub. L. 109-2, § 2, 119 Stat. 4-5. Congress concluded CAFA was necessary because, "[a]buses in class actions undermine the judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." *Id.* at § 2(a)(4). One specific abuse identified was the practice of "keeping cases of national importance out of Federal court." *Id.* at § 2(a)(4)(C).

Moreover, the Senate Report on CAFA notes that CAFA amended § 1332 "to allow more federal courts to hear more interstate class actions on a diversity jurisdiction basis, and (b) modifies the federal removal statute to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts if any of the defendants so desire." SEN. REP. NO. 109-14 at 5 (2005). Thus, CAFA was designed to make it more difficult for plaintiffs' counsel to manipulate the legal system by exploiting procedural rules to avoid diversity jurisdiction and removal to federal courts. Congress specifically identified one purpose of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court

consideration of interstate cases of national importance under diversity jurisdiction." CAFA, Pub. L. 109-2, § 2(b)(3), 119 Stat. 4-5. The stated intention to expand federal jurisdiction demonstrates why the holding of *Shamrock Oil* should not apply to removals of class actions under CAFA. In *Shamrock Oil*, the court recognized Congress changed the text of the statute at issue to restrict federal jurisdiction. Section 1453(b), however, reflects a clear intent to expand federal jurisdiction. *See Shamrock Oil*, 313 U.S. at 107; CAFA, Pub. L. 109-2, § 2(b)(3), 119 Stat. 4-5; 28 U.S.C. § 1453(b). Thus, the legal environment surrounding the statute at issue in *Shamrock Oil* was dramatically different than the legal environment in which CAFA was drafted and enacted.

In addition, the panel's holding creates a loophole in CAFA that permits class action plaintiffs to avoid federal court merely by waiting to bring their class actions as counterclaims, even though Congress clearly intended for such class actions to be litigated in federal court. Under the Seventh Circuit's holding in this case, a company that must pursue legal action in state court to seek redress for any injury is vulnerable to being forced to defend in state court the exact types of class actions that Congress has indicated should be litigated in federal court. This effect is especially pronounced in states such as Illinois, where the counterclaim need not even be related to the original complaint. 735 ILCS 5/2-608; *Johnson v. Moon*, 3 Ill.2d 561 (Ill. 1954) ("[S]o long as the counterclaims are directed against original parties to the suit it is not necessary that they be germane to

the matters in the complaint.") This unfairness is exacerbated in circumstances where the plaintiff is forced to file the original action in state court by virtue of the lack of federal court jurisdiction or otherwise. By allowing "any defendant," including counterclaim defendants, to remove class actions to federal court, Congress plainly foreclosed such an exception from being read into the statute, an exception that would go far in swallowing the rule.

The holding of the Seventh Circuit allows class action plaintiffs to completely circumvent CAFA by waiting to bring their class actions as counterclaims. The panel's holding also creates a disparity in rights afforded to defendants that the plain language of § 1453(b) shows Congress did not intend. Under the panel's interpretation of § 1453(b), class actions that would be removable under CAFA, if filed independently as a stand-alone action, must stay in state court if the class action is filed as a counterclaim. Congress intended CAFA to reduce class action abuses by allowing all class actions involving more than 100 putative class members, in cases where minimal diversity exists, and which are valued in excess of $5 million dollars, to be removed to federal court. If, however, a class action plaintiff chooses to bring the same class action as a counterclaim, the counterclaim defendant does not enjoy the protection of CAFA. Congress could not have intended this discrepancy.

C. The Question Presented In This Case Is Recurring and of National Importance.

The Supreme Court has not addressed the issue presented here. This Court should review the Seventh Circuit Court of Appeals' decision in this case because it raises a recurring issue of national importance. While there is no circuit split, the Court ought to review the Seventh Circuit's holding and issue a determinative interpretation of § 1453(b). Over the last few years, plaintiffs' counsel have increasingly filed class actions that would otherwise qualify for removal under CAFA, but have been able to avoid federal jurisdiction by labeling the class claims as a counterclaim.[5]

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5. In the following cases, courts concluded that a party that was something other than an original defendant could not remove qualifying class actions to federal court under CAFA: *Palisades Collection, LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008) (denying party added to suit by way of class action counterclaim from removing under 28 U.S.C. 1453(b)); *Progressive W. Ins. Co. v. Preciado* 479 F.3d 1014 (9th Cir. 2007)(stating in dicta that a plaintiff/counterclaim defendant may not remove under 28 U.S.C. 1453(b)); *Liberty Credit Servs. v. Yonker*, Case No. 5:10-CV-00838, 2010 U.S. Dist. LEXIS 64933 (N.D. Ohio June 29, 2010); *Capital One (USA) N.A. v. Reese*, Case No. 5:10CV580, 2010 U.S. Dist. LEXIS 60608 (N.D. Ohio June 18, 2010); *American Express Bank, FSB v. Percin*, No. CIV S-10-0331 LKK DAD PS, 2010 U.S. Dist. LEXIS 15989 (E.D. Cal. Feb. 23, 2010); *Am. Gen. Fin. Servs. v. Griffin*, 685 FSupp.2d 729 (N.D. Ohio Feb. 17, 2010); *CitiFinancial, Inc. v. Lightner*, Civil Action No. 5:06CV145, 2007 U.S. Dist. LEXIS 41338 (N.D. W.Va. June 6, 2007); *Unifund CCR Ptnrs v. Wallis*, Civil Action Nos. 06-CV-545-GRA, 06-CV-546-GRA, and 06-CV-547-GRA, 2006 U.S. Dist. LEXIS 17989

(Cont'd)

Indeed, just last year, AT & T Mobility LLC filed a petition for writ of certiorari in this Court seeking this Court's resolution of the same question Petitioner presents. Although this Court denied the petition, it is now clear that this is a recurring issue requiring guidance from this Court. *See AT&T Mobility LLC v. Shorts*, 129 S.Ct. 2826 (2009) In addition, several other cases in district courts across the United States have confronted this same issue and have generally refused to permit removal. The Seventh Circuit's holding, though consistent with other courts, is incorrect because it ignores both the letter and spirit of CAFA and creates a gaping loophole in CAFA that Congress certainly did not intend.

(Cont'd)

(D. S.C. Apr. 7, 2006). Only one court, *Deutsche Bank Nat'l Trust Co. v. Weickert* has held that 28 U.S.C. § 1453(b) authorizes class-action defendants, joined by way of counterclaim, to remove to federal court. *Deutsche Bank Nat'l Trust v. Weickert*, 638 FSupp.2d 826, 830 (N.D. Ohio 2009) *appeal docketed*, No. 09-4190 (6th Cir. Sept. 29, 2009). Although the Sixth Circuit Court of Appeals granted defendants' petition for permission to appeal under 28 U.S.C. § 1292(b), neither party has submitted briefing. Rather, according to the docket, it appears the parties are in the process of entering a stipulation to dismiss the appeal with prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GORDON R. BROOM
Counsel of Record
TROY A. BOZARTH
W. JASON RANKIN
HEPLERBROOM LLC
103 W. Vandalia Street
Suite 300
Edwardsville, IL 62040
(618) 656-0184
gordon.broom@heplerbroom.com

Counsel for Petitioner

July 2010

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MARCH 24, 2010

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 10-8008 & 10-8009

FIRST BANK,

Plaintiff, Counterdefendant-Petitioner,

v.

DJL PROPERTIES, LLC, *et al.*,

Defendants, Counterplaintiffs-Respondents.

Petitions for Leave to Appeal from the United States District Court for the Southern District of Illinois.
Nos. 09-cv-969-MJR & 09-cv-970-JPG
Michael J. Reagan and J. Phil Gilbert, *Judges.*

Submitted March 4, 2010—Decided March 24, 2010

Before EASTERBROOK, *Chief Judge*, and ROVNER and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Chief Judge*. First Bank commenced two suits in state court against DJL Properties, which filed counterclaims styled as class actions. First Bank then filed notices of removal, invoking

the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453. The proceedings were assigned to different district judges. Judge Gilbert remanded one of the suits, concluding that a litigant who initially chose the state forum cannot remove even after becoming a counterclaim defendant. 2010 U.S. Dist. LEXIS 7204 (S.D. Ill. Jan. 27, 2010). Judge Reagan then remanded the other suit, adopting Judge Gilbert's reasoning. 2010 U.S. Dist. LEXIS 7700 (S.D. Ill. Jan. 29, 2010). We grant First Bank's petition for leave to appeal, see § 1453(c)(1), because the cases present an issue not yet resolved in this circuit.

Chapter 89 of the Judicial Code, 28 U.S.C. §§ 1441-53, authorizes removal of certain cases by "defendants." Almost 70 years ago, the Supreme Court concluded that a litigant who files suit in state court is a "plaintiff" and cannot remove the case, even if the defendant files a counterclaim and the original plaintiff then wears two hats, one as plaintiff and one as defendant—and even if the counterclaim is distinct from the original claim and could have been a separate piece of litigation. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). That rule may be as old as 1867. See *West v. Aurora*, 73 U.S. 139, 142, 18 L. Ed. 819 (1867). It remains the law for removal in general, and two circuits have held that it applies to removal under the Class Action Fairness Act in particular. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008); *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007). Judge Gilbert held that *Shamrock Oil*, *Palisades Collections*, and *Progressive West Insurance* prevent First Bank from removing;

Judge Reagan agreed; so do we. We conclude that *Palisades Collections* and *Progressive West Insurance* were rightly decided.

Section 1453(b) says that a "class action" (a defined term) may be removed "in accordance with section 1446" whether or not "any defendant" is a citizen of the state in which the suit is pending, and "without the consent of all defendants". (Otherwise every defendant must sign the notice of removal. *Chicago, Rock Island & Pacific Ry. v. Martin*, 178 U.S. 245, 20 S. Ct. 854, 44 L. Ed. 1055 (1900).) The 2005 Act thus refers us to § 1446, which specifies where and when "defendants" file notices of removal. Section 1441, which creates the right of removal for cases that could have been filed initially in federal court, also says that "defendants" may remove a suit.

First Bank contends that the word "defendant" in § 1453(b) includes a counterclaim defendant even though the word "defendant" in § 1441 and § 1446 does not. That would make hash of Chapter 89, because § 1453(b) refers to § 1446; unless the word "defendant" means the same thing in both sections, the removal provisions are incoherent. More than that: the word "defendant" has an established meaning in legal practice, and it is vital to maintain consistent usage in order to ensure that Members of Congress (and those who advise them) know what proposed language will do, and people can understand the meaning of statutes.

It does not follow from the fact that the 2005 Act expands the set of removable cases that it must use "defendant" in a novel way. The statute employs time-tested legal language. If the drafters of the 2005 Act wanted to negate *Shamrock Oil*, they could have written "defendant (including a counterclaim defendant)" or "any party" (the phrase in 28 U.S.C. § 1452(a) for removal in bankruptcy proceedings). But they chose the unadorned word "defendant," a word with a settled meaning.

First Bank observes that in § 1453(b) the word "any" precedes the word "defendant". "Any" is inclusive, to be sure, but the word that it modifies remains "defendant"—which First Bank is not, under *Shamrock Oil*. "Any" appears twice. The function of the first "any" in § 1453(b) is to establish that § 1441(b), which provides that a home-state defendant can't remove a diversity suit, does not apply. (The context is: "without regard to whether any defendant is a citizen of the State in which the action is brought".) The function of the second "any" is to establish that a single defendant's preference for a federal forum prevails, notwithstanding *Martin*. (The context is: "except that such action may be removed by any defendant without the consent of all defendants".) Neither instance of the word "any" implies that "defendant" means something different in § 1441(b) and § 1453(b).

By using a word with an established meaning, Congress produces the established result. See, e.g., *Nken v. Holder*, 129 S. Ct. 1749, 1759, 173 L. Ed. 2d 550

(2009); *Whitfield v. United States*, 543 U.S. 209, 216, 125 S. Ct. 687, 160 L. Ed. 2d 611 (2005). See also *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (applying this approach to the 2005 Act). Giving legal words their standard legal meaning spares judges and lawyers expensive tours through the legislative history and avoids the impossible task of trying to guess what Members of Congress may have "had in mind" or "intended" about statutory language. See *Hor v. Gonzales*, 400 F.3d 482, 484-85 (7th Cir. 2005). Doubtless First Bank is right to say that exempting counterclaims from § 1453 means that the 2005 Act achieves less than it otherwise would, but "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (emphasis in original). Congress enacted a *rule* allowing removal by "defendants"; it did not say anything similar to: "Courts may allow removal whenever the case involves a large, multi-state class action."

The word "defendant" in § 1453(b) means what the word "defendant" means elsewhere in Chapter 89-and, as *Shamrock Oil* held, that word does not include a plaintiff who becomes a defendant on a counterclaim.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JANUARY 29, 2010

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 09-CV-0969-MJR

FIRST BANK,

Plaintiff,

v.

DJL PROPERTIES, LLC; JONATHON E. GUTHRIE; and LISA M. GUTHRIE,

Defendants.

ORDER

REAGAN, District Judge:

First Bank removed this case from the Circuit Court of Saint Clair County, Illinois on November 17, 2009, on the basis of a counterclaim in apparent disregard of Supreme Court case law. ***See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).** The Court ordered supplemental briefing because it doubted jurisdiction. It turns out that First Bank removed another case from Saint Clair County to this Court on the same day with the same counterclaim. That case was assigned to

another District Judge who also doubted jurisdiction. ***First Bank v. DJL Props., LLC*, No. 09-CV-0970-JPG (S.D. Ill. Jan. 27, 2010) (Gilbert, J.).**[1] For the reasons stated in Judge Gilbert's opinion (*see id.* Doc. 21), the Court finds that it lacks subject-matter jurisdiction and **REMANDS** the case to the Circuit Court of Saint Clair County, Illinois.

IT IS SO ORDERED.

DATED January 29, 2010,

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

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1. The Court reminds counsel for Plaintiff to indicate related cases on the Court's civil cover sheet when filing a new case, even if the related cases are filed simultaneously with the new case. This will not only increase judicial efficiency by making sure that related cases are assigned to the same District Judge, ***see Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511 (7th Cir. 1999)**, but will also eliminate any unintended appearance of judge shopping, ***see* S.D. Ill. R. 40.1(a)** ("Civil cases are randomly assigned to a District Judge pursuant to Administrative Order as from time to time amended by the Court. Any action taken to avoid the random assignment will subject that party and that party's attorney(s) to the full disciplinary power and sanctions of this Court."). This "gentle reminder" is in lieu of a Rule to Show Cause.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JANUARY 27, 2010

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 09-cv-970-JPG

FIRST BANK,

Plaintiff/Counterdefendant,

v.

DJL PROPERTIES, LLC,

Defendant/Counterplaintiff,

and

JONATHON E. GUTHERIE, LISA M GUTHERIE, AMERICAN BOTTOMS REGIONAL WASTEWATER TREATMENT FACILITY, METRO EAST SANITARY DISTRICT, THE VILLAGE OF SAUGET, ALL UNKNOWN OWNERS AND NON-RECORD CLAIMANTS,

Defendants.

Appendix C

MEMORANDUM AND ORDER

This matter comes before the Court on the Court's December 7, 2009, order to show cause why this case should not be remanded to state court (Doc. 11). Plaintiff/counterdefendant First Bank has responded to the order to show cause (Doc. 12), defendant/counterplaintiff DJL Properties, LLC, has replied to that response (Doc. 15), and First Bank has replied to the reply (Doc. 19). For the following reasons, the Court will remand this case to state court.

This case originated in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois. Plaintiff First Bank's complaint alleges a state law claim for mortgage foreclosure. In response, defendant DJL Properties, LLC ("DJL"), filed a class action counterclaim alleging state law causes of action under several Illinois statutes and a state law cause of action for breach of contract. Believing the class action counterclaim created original federal jurisdiction over this action under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2)(A), First Bank filed a notice of removal.

In light of Seventh Circuit admonitions, *see, e.g.*, *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072 (1992), the Court has undertaken a rigorous initial review of pleadings to ensure that jurisdiction exists. Here it does not because removal jurisdiction only exists where a defendant files a notice of removal. *See Shamrock Oil & Gas v. Sheets*, 313 U.S.

100, 107-08, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). Here, the plaintiff/counterdefendant is attempting to remove this case.

In its notice of removal, First Bank acknowledges that under *Shamrock Oil* the foregoing defects would require remand of this case had it not contained a class action counterclaim. *Shamrock Oil* established that the federal law authorizing removal by a defendant does not include removal by a counterdefendant.[1] *Id.* at 107-08. In that case, a plaintiff/counterdefendant removed an action to federal court on the basis of diversity jurisdiction over the counterclaim. *Id.* at 103. The Supreme Court noted that a prior version of the removal statute had allowed "either party" to remove a case but that Congress had amended the language to allow removal only by "the defendant or defendants." *Id.* at 106-07. The Court reasoned that, had Congress intended to allow plaintiffs to maintain the right of removal they

1. The *Shamrock Oil* Court examined a prior version of the removal statute, but that version is substantively indistinguishable from 28 U.S.C. § 1441 in any way relevant to this case. 28 U.S.C. § 1441(a) states in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

had under the "either party" version of the statute, it would have explicitly said so in the amendment language. *Id.* at 107. Instead, Congress chose language it knew the Supreme Court had construed in a prior case to withhold the power of removal from a plaintiff/counterdefendant. *Id.* at 107-08 (citing *West v. Aurora City*, 73 U.S. 139, 141-42, 18 L. Ed. 819 (1867) (6 Wall.)). The *Shamrock Oil* Court further noted the need to respect the independence of state courts by restricting removal jurisdiction only to the precise limits set forth in the removal statute. *Id.* at 109. The Court concluded that when the removal statute allowed for removal by "the defendant or defendants," it did not confer that right on plaintiff/counterdefendants. *Id.* at 106-07.

First Bank argues that CAFA changed the long-standing, well-established rule set forth in *Shamrock Oil* because CAFA refers to the ability of "any defendant" to remove a class action regardless of the citizenship or consent of the other defendants. 28 U.S.C. § 1453(b).[2]

2. 28 U.S.C. § 1453(b) states in its entirety:

> **In general.**—A class action may be removed to a district court of the United States in accordance with section 1446 (except the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1446(a), in turn, states in pertinent part: "A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States . . . a notice of removal. . . ."

It believes that, after CAFA, a plaintiff sued in a class action counterclaim may remove the entire action to federal court regardless of the claims pled in the original complaint. It bases this argument on the language of § 1453(b) and Congressional intent to expand federal jurisdiction by enacting CAFA. As the party invoking federal jurisdiction, First Bank bears the burden of demonstrating the existence of that jurisdiction, and the Court should construe the removal statute narrowly. *See Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009) (citing *Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)).

In support of its position, First Bank cites *Deutsche Bank Nat'l Trust v. Weickert*, 638 F. Supp. 2d 826 (N.D. Ohio 2009). *Deutsche Bank* involved a case similar to the case at bar. There, counterdefendants (who were not original plaintiffs) filed a notice of removal of a case that began as a state law foreclosure action but that included state law class action counterclaims. *Id.* at 827. The *Deutsche Bank* court read the "any defendant" language in § 1453(b) to encompass counterdefendants and to expand removal beyond the bounds of § 1441(a). *Id.* at 829. The court found this consistent with Congress' purpose in CAFA to expand federal jurisdiction to include interstate class actions of national importance. *Id.* at 829-30. A contrary ruling, the court said, would contravene Congressional intent. *Id.* at 830.

The Court does not find *Deutsche Bank* persuasive. Instead, it agrees with the Fourth Circuit Court of Appeals' decision in *Palisades Collections LLC v. Shorts*,

552 F.3d 327 (4th Cir. 2008). In that case, the plaintiff filed a state law collection action, and the defendant filed a class action counterclaim against the plaintiff and additional counterdefendants. *Id.* at 329. A newly added counterdefendant then filed a notice of removal on the grounds that the federal court had original jurisdiction over the counterclaim under CAFA. *Id.*

The *Palisades* court held that § 1441(a) did not permit removal by a counterdefendant. It reasoned that *Shamrock Oil* established that a counterdefendant is not a "defendant" allowed to remove a case under § 1441(a). *Id.* at 333. As explained in *Shamrock Oil*, Congress made that decision when it amended the removal statute, and the courts must respect that decision when exercising removal jurisdiction. *Id.*

Palisades also rejected the notion that § 1453(b) changed that general rule where a counterdefendant tries to remove a case based on CAFA jurisdiction. *Id.* at 336. First, it noted that § 1453(b) does not expressly allow removal by counterdefendants. It refers only to removal by a "defendant" and cross-references § 1446, which also speaks only to procedures for removal by "a defendant or defendants." *Id.* at 334. The *Palisades* court presumed Congress understood the established interpretation of "defendant" set forth decades earlier by *Shamrock Oil* and declined to find that Congress intended to change that interpretation by implication with § 1453(b). *Id.* at 334. Second, the court held that the two phrases containing the "any defendant" terminology in § 1453(b) do not change the

Shamrock Oil rule. On the contrary, the court interpreted "defendant" consistently with the established meaning of "defendant" in § 1441(a) — that is, as only an original defendant — to refer only to eliminating the forum defendant rule of § 1441(b) and the judicially recognized unanimity requirement. *Id.* at 335-36. The meaning of "defendant," the court held, is not changed by the modifier "any." *Id.* at 335. The court concluded, "Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear." *Id.* at 336.

Finally, the *Palisades* court noted that, although Congress intended to expand federal jurisdiction by enacting CAFA, the Court must still interpret CAFA as it is written, not as Congress might have intended to write it. *Id.*

The Ninth Circuit Court of Appeals came to a similar conclusion for similar reasons in *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007) ("CAFA does not alter the longstanding rule announced in Shamrock that precludes plaintiff/cross-defendants from removing class actions to federal court."

The Court agrees with the *Palisades* and *Progressive* holdings. The text of § 1453(b) does not expressly permit a plaintiff/counterdefendant to remove a class action to federal court. It does not impliedly do so either. For decades before Congress passed CAFA,

the law was well-established that, in the removal context, "defendant" meant only an original defendant. Congress is presumed to have known this, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and the Court will not find that it intended to alter this understanding in the absence of express language doing so, as it did when it wanted to change other aspects of class action jurisdiction. *See, e.g.*, 28 U.S.C. § 1332(d)(10) (altering the way citizenship of an unincorporated association is determined in class actions); 28 U.S.C. § 1453(b) (altering the unanimity requirement, the forum defendant rule and the limitation period for removal).

Furthermore, the Court finds that the use of the phrase "any defendant" does not mean, as First Bank argues, "any type of defendant." When viewed with the legal landscape as it existed when CAFA was enacted and in the context of the removal statutes as a whole, the Court believes "any defendant" is more likely to mean "any of the defendants," with "defendants" being interpreted as it was in *Shamrock Oil*.

Clear congressional intent to expand federal jurisdiction with CAFA does not change the Court's conclusion. It is true that by enacting CAFA, Congress intended to expand federal jurisdiction and, indeed, it did so by allowing expanded filing and removal of original class actions. However, such an intent does not justify expansion of jurisdiction to cases not expressly authorized by statute. Respect for federalism still requires a narrow reading of the removal statutes, and the Court can only interpret the laws as they are written.

DJL Properties further requests attorney's fees and costs for First Bank's improper removal of this case. Section 1447(c) states, in pertinent part, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). The Court retains discretion to determine if unusual circumstances counseling against this general rule exist. *Id.* This rule serves to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Id.* at 140. Because the question of removal under CAFA by a plaintiff/counterdefendant based on a class action counterclaim has not been explicitly addressed by the Supreme Court or the Court of Appeals for the Seventh Circuit and has been subject to various rulings by district courts, the Court finds that there was an objectively reasonable basis for the removal of this case. It therefore declines to award attorney's fees under 28 U.S.C. § 1447(c).

For the foregoing reasons, the Court finds that it does not have removal jurisdiction over this case and **REMANDS** it to the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois.

IT IS SO ORDERED.
DATED: January 27, 2010

/s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 22, 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 22, 2010

Before

FRANK H. EASTERBROOK, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

Appeal from the United States District Court for the Southern District of Illinois.

Nos. 09-cv-969-MJR & 09-cv-970-JPG
Michael J. Reagan and J. Phil Gilbert, *Judges.*

Nos. 10-8008 & 10-8009

FIRST BANK,

Plaintiff, Counterdefendant-Petitioner,

v.

DJL PROPERTIES, LLC, *et al.*,

Defendants, Counterplaintiffs-Respondents.

Appendix D

Order

First Bank filed a petition for rehearing and rehearing en banc on April 7, 2010. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E — RELEVANT STATUTES

**Class Action Fairness Act of 2005,
Pub. L. No. 109-2, 119 Stat. 4 provides:**

(a) Findings.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Appendix E

(b) Purposes.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

28 U.S.C. § 1332 provides in pertinent part:

§ 1332. Diversity of citizenship; amount in controversy; costs

* * * * *

(d) (1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an

action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A) (i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of

the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453 [28 USCS § 1453], an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453 [28 USCS § 1453], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) (i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2) [28 USCS § 1711(2)]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C) (i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 [28 USCS

§ 1407], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407 [28 USCS § 1407].

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

* * * * *

Appendix E

28 U.S.C. § 1441 provides in pertinent part:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 USCS §§ 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * * * *

(e) (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

> (A) the action could have been brought in a United States district court under section 1369 of this title [28 USCS § 1369]; or
>
> (B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 [28 USCS § 1369] in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title [28 USCS § 1446], except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 [28 USCS § 1369] in a United States district court that arises from the same accident as

the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) [28 USCS § 1407(j)] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 [28 USCS § 1369] and an action in which jurisdiction is based on section 1369 of this title [28 USCS § 1369] for purposes of this section and sections 1407, 1697, and 1785 of this title [28 USCS §§ 1407, 1697, and 1785].

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

* * * * *

28 U.S.C. § 1446 provides in pertinent part:

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the

grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [28 USCS § 1332] more than 1 year after commencement of the action.

* * * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

* * * * *

28 U.S.C. § 1453 provides in pertinent part:

§ 1453. Removal of class actions

(a) Definitions. In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1) [28 USCS § 1332(d)(1)].

(b) In general. A class action may be removed to a district court of the United States in accordance with section 1446 [28 USCS § 1446] (except that the 1-year limitation under section 1446(b) [28 USCS § 1446(b)] shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.

(1) In general. Section 1447 [28 USCS § 1447] shall apply to any removal of a case under this section, except that notwithstanding section 1447(d) [28 USCS § 1447(d)], a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment. If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

* * * * *

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(2)

No. 10-137

Supreme Court, U.S.
FILED
SEP 27 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FIRST BANK,

Petitioner

v.

DJL PROPERTIES, LLC, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DJL PROPERTIES, LLC

BERNARD YSURSA
Counsel of Record
12 West Lincoln Street
Belleville, Illinois 62220
618-235-3500
bjy@cooklawoffice.com

THOMAS R. YSURSA
5111 West Main Street
Belleville, Illinois 62226
618-235-0020

Counsel for Respondent, DJL Properties, LLC

232489

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the Class Action Fairness Act of 2005 (CAFA), (Pub.L.No.109-2, 119 Stat. 4 (2005), allow an original plaintiff named as a counterclaim defendant to remove a counterclaim to federal court?

COMPLETE LISTING OF PARTIES

First Bank

DJL Properties, LLC

Jonathon E. Guthrie

Lisa M. Guthrie

Metro East Sanitary District

American Bottoms Regional Wastewater Treatment Facility

Land Lincoln Securities, LLC

Village of Sauget

Ravens Securities, Inc.

St. Clair County Trustee

VI, Inc.

RULE 29.6 STATEMENT

DJL Properties, LLC is a member Illinois limited liability corporation with Lisa Guthrie and Jonathon Guthrie as the members. No parent or publicly held company owns 10% or more of the corporation's stock.

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JURISDICTION

Respondent, DJL Properties, LLC, respectfully submits that this Supreme Court lacks jurisdiction over this appeal. Normally 28 U.S.C. §1254(1) provides this Supreme Court jurisdiction to entertain a petition for a *writ of certiorari*; however, this case involves an appeal of a class action counterclaim remand order. Historically remand orders are not reviewable per 28 U.S.C. §1447(d) which states:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to *section 1443* of this title shall be reviewable by appeal or otherwise. See 28 U.S.C. §1447(d).

CAFA changed this and allowed courts of appeal to review class action remand orders pursuant to 28 U.S.C. §1453(c)(1) which provides:

> *Section 1447* shall apply to any removal of a case under this section, except that notwithstanding *section 1447(d)*, a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action . . . See 28 U.S.C. §1453(c)(1).

While CAFA provided a court of appeals the right to review remand orders under §1453(c)(1); it did not grant that jurisdiction to this Supreme Court to review

remand orders. Respondent also respectfully suggests that the well pleaded counterclaim fails to demonstrate any basis for federal jurisdiction that would subject the remand orders to appeal under §1453(c)(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this case but omitted from those listed in the Petition for a *Writ of Certiorari*, 28 U.S.C. §1447(d). The relevant portion of 28 U.S.C. §1447 is reproduced in the Respondent, DJL Properties, LLC's Appendix.

STATEMENT OF THE CASE

The issue presented in this case is whether the Seventh Circuit Court of Appeals, consistent with the Ninth Circuit Court of Appeals and Fourth Circuit Court of Appeals, erred in upholding the near-canonical holding of *Shamrock Oil & Gas Corp. v. Sheets*, (313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941)), that a counterclaim defendant cannot remove an action to federal court. Specifically the issue presented is whether CAFA changed the *Shamrock* rule so that a litigant that files an action in state court as a "plaintiff" can remove a counterclaim filed against it to federal court.

A. Procedural History

This case involves the removal of two lawsuits from Illinois State Court to the United States District Court for the Southern District of Illinois. Plaintiff/ Counterclaim-Defendant, First Bank, filed a suit for

foreclosure, (Illinois Twentieth Judicial Circuit Case No. 09-CH-506), and a suit for breach of contract based upon the commercial guarantees securing the loans that are the subject of the foreclosure lawsuit, (Illinois Twentieth Judicial Circuit Case No. 09-L-238). Both lawsuits were directed primarily against Defendants, Jonathon Guthrie, and Lisa Guthrie, and Defendant/ Counterclaim-Plaintiff, DJL Properties, LLC, (the foreclosure case does name additional parties due to the requirements of Illinois foreclosure law). On October 20, 2009, Counterclaim-Plaintiff, DJL Properties, LLC, filed Class Action Counterclaims against First Bank in both state court cases.[1] First Bank removed both actions on November 19, 2009 asserting jurisdiction pursuant to CAFA, 28 U.S.C. §1453. The District Court in fulfillment of its duty to ensure proper jurisdiction issued an order on December 7, 2009 directing the parties to brief the issue of jurisdiction. Both parties briefed the issue and on January 27, 2010 Judge Gilbert remanded Case No. 09-CV-0970-JPG to state court. See Petitioner's Appendix 8a. Judge Reagan remanded Case No. 09-CV-0969-MJR to State Court two days later on January 29, 2010. See Petitioner's Appendix 6a.

First Bank filed two Petitions for Permission to Appeal the Remand Order pursuant to 28 U.S.C. §1453(c) with the United States Seventh Circuit Court

1. First Bank makes a point to mention that the Class Action Counterclaims were filed "Approximately four months later, without leave of court and without having filed an answer. . ." See Petition for a *Writ of Certiorari* pp. 2. It should be noted that such a procedural issue is not relevant to the issue before this Supreme Court but to clarify the issue the State Court has since deemed the Counterclaims as filed. Furthermore, First Bank did not object or move to strike the filing of the Counterclaims.

of Appeals. On March 24, 2010, the Seventh Circuit granted the Petitions for Permission to Appeal and simultaneously issued an order denying the appeals. See Petitioner's Appendix 1a; *First Bank v. DJL Properties, LLC.*, 598 F.3d 915, 918 (7th Cir. 2010). On April 7, 2010 First Bank filed a Petition for Rehearing and Rehearing En Banc. The Petition for Rehearing and Rehearing En Banc was denied on April 22, 2010. See Petitioner's Appendix 18a. First Bank filed its Petition for a *Writ of Certiorari* with this Supreme Court on July 20, 2010.

B. Factual Background

The claims asserted in the class action counterclaims against First Bank involve First Bank overcharging Counterclaim-Plaintiff interest in violation of the Promissory Note between First Bank and Counterclaim-Plaintiff. The Counterclaim asserts breach of contract and Illinois statutory violations. The actual facts of the allegations are not at issue in this Petition for a *Writ of Certiorari*. The sole issue in this Petition for a *Writ of Certiorari* is whether CAFA permits a plaintiff/counterclaim-defendant to remove a class action counterclaim.[2]

The essential facts relevant to the issue raised in this Petition for a *Writ of Certiorari* are simple. First Bank voluntarily elected to sue Defendant/Counterclaim-Plaintiff in two separate lawsuits in state court. The

2. Counterclaim-Plaintiff does not take a position on whether the other elements of CAFA jurisdiction exist, i.e. amount in controversy etc., as the sole issue raised by this Petition is whether a plaintiff/counterclaim-defendant may remove a class action counterclaim under CAFA.

Promissory Note, Mortgage, and Commercial Guaranties relevant to this action all contain essentially the same venue clause: "If there is a lawsuit [Borrower] [Grantor] [Guarantor], agrees upon Lender's request to submit to the jurisdiction of the courts of St. Clair County, State of Illinois." Counterclaim-Plaintiff filed class action counterclaims in both state court cases. First Bank removed both actions to federal court citing CAFA jurisdiction based solely on the class action counterclaims.

SUMMARY OF ARGUMENT

This Supreme Court should deny the Petition for a *Writ of Certiorari* for three reasons. First, CAFA did not grant this Supreme Court jurisdiction to entertain an appeal of a remand order. Second, the Seventh Circuit Court of Appeals correctly held that CAFA did not change the definition of "defendant" to include a counterclaim-defendant. In support of this conclusion the Seventh Circuit cited the Fourth Circuit opinion in *Palisades Collections, LLC v. Shorts*, (552 F3d 327 (4th Cir. 2008)), and the Ninth Circuit opinion in *Progressive West Insurance Co. v. Preciado*, (479 F3d 1014 (9th Cir. 2007)). The Seventh Circuit correctly reasoned that the text of §1453(b) does not grant a counterclaim-defendant the right to remove a class action counterclaim. The Seventh Circuit held that Congress, armed with full knowledge of the definition of "defendant" under the removal provisions, failed to insert appropriate language to expand the definition of "defendant" in the removal provisions to include a counterclaim-defendant. Third, First Bank has failed to establish that this matter raises an issue of national importance that requires this

Supreme Court to settle the state of the law as there is no dispute as to the state of the law.

REASONS FOR DENYING THE PETITION

A. The Seventh Circuit Opinion Is Correct

As Chief Judge Easterbrook eloquently held in his opinion "The word "defendant" in § 1453(b) means what the word "defendant" means elsewhere in Chapter 89- and, as *Shamrock Oil* held, that word does not include a plaintiff who becomes a defendant on a counterclaim." See Petitioner's Appendix 5a; *First Bank v. DJL Properties, LLC.*, 598 F.3d at 918. The Seventh Circuit correctly held that CAFA does not authorize removal in this case for the following reasons: (1) two other circuit courts of appeal have correctly held the same; (2) the word "defendant" must be given consistent meaning between the removal provisions; (3) the time tested meaning of "defendant" was known to Congress and if the legislature had intended to change the meaning it could have included language indicating such; and (4) to reach the conclusion proposed by First Bank would require the judiciary to guess as to the intent of members of Congress in the final legislation.

Judge Easterbrook noted that two other Circuit Courts of Appeal, the Fourth Circuit and the Ninth Circuit, have reached the same conclusion as the Seventh Circuit on the issue of counterclaim removal. In the case of *Palisades Collections, LLC v. Shorts*, (552 F.3d 327), the Fourth Circuit provided a detailed analysis of the issue of whether a counterclaim-defendant may remove an action under 28 U.S.C. §1453. In *Palisades* the

original plaintiff, Palisades Collections sued Shorts in West Virginia State Court. Shorts countersued Palisades. Approximately a year after the counterclaim, Shorts filed an amended counterclaim adding AT&T Mobility, ("ATTM"), as an additional counterclaim-defendant. ATTM then removed the action to federal court citing CAFA. The original plaintiff, Palisades, never attempted to remove. See *Palisades*, 552 F.3d at 329. The Fourth Circuit first examined whether the case was removable under the general removal statute, 28 U.S.C. §1441. The Court concluded that an additional counterclaim-defendant could not remove based upon the nearly seventy (70) years of precedence since *Shamrock Oil*. See *Palisades*, 552 F.3d at 332-34. The Fourth Circuit then addressed whether CAFA permits removal under 28 U.S.C. §1453(b). The Court concluded that it did not. See *Palisades*, 552 F.3d at 334-36. In reaching its conclusion the Fourth Circuit found that the word "defendant" as contained in §1453(b) has the same meaning as "defendant" found in the other removal provisions, which is consistent with the almost seventy (70) years of precedence since *Shamrock Oil*.

First Bank cites the dissent in *Palisades* as the reasoning this Supreme Court should adopt in allowing removal. In the dissent Judge Niemeyer argues that the insertion of the adjective "any" in §1453(b) changes the meaning of the noun "defendant". See *Palisades*, 552 F.3d at 339. Judge Niemeyer refers to the definition of the adjective "any" as being expansive and the article "the" as being restrictive. See *Palisades*, 552 F.3d at 340. Judge Niemeyer concludes that the insertion of the word "any" demonstrates the Congressional intent to permit removal by a counterclaim-defendant. See *Palisades*, 552 F.3d at 339.

Judge Easterbrook did not ignore the inclusion of the word "any" in §1453(b) but rather considered the effect of its inclusion. Judge Easterbrook wrote that "'Any' is inclusive, to be sure, but the word that it modifies remains 'defendant'-which First Bank is not, under *Shamrock Oil*." See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. Judge Easterbrook concluded §1453(b) inserted two references to "any" in order to address two barriers to removal that CAFA was drafted to eliminate and noted that an examination of the context of the two uses of "any" in §1453(b) demonstrates this intention. See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917.

The first barrier CAFA was intended to bring down was that a home-state defendant cannot remove an action from its home-state court. §1453(b) states that class action may be removed in according with §1446 "without regard to whether any defendant is a citizen of the State in which the action is brought . . ." See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. Judge Easterbrook correctly notes that the context of the first "any" in §1453(b) is in relation to the citizenship of the defendant. See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. This context is ignored by First Bank and the dissent in *Palisades*. The second "any" in §1453(b) is included in the following phrase ". . . except that such action may be removed by any defendant without the consent of all defendants." See 28 U.S.C. §1453(b). This "any" is intended to negate the rule of consent of all defendants in order to allow a lawsuit to be removable as articulated in *Chicago Rock Island & Pacific Ry. v. Martin*, (178 U.S. 245, 20 S.Ct. 854, 44 L.Ed. 1055 (1900)). Judge Easterbrook again notes the

context of "any" and finds that the second "any" was inserted with the specific purpose of eliminating the *Martin* barrier to removal for class actions. See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. Judge Easterbrook concludes that the purpose of the two references to "any" in §1453(b) by writing: "Neither instance of the word 'any' implies that 'defendant' means something different in §1441(b) and §1453(b)". See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917.

Prior to *Palisades* and before this Supreme Court denied certiorari in that case, (see *AT&T Mobility LLC v. Shorts*, ___ U.S. ____,129 S.Ct. 2826, 174 L.Ed.2d 553 (2009)), the Ninth Circuit Court of Appeals addressed the question of whether CAFA allows for removal by a counterclaim defendant. In *Progressive West Insurance Co. v. Preciado*, (479 F.3d 1014), the Ninth Circuit was faced with an issue wherein the original plaintiff removed an action to federal court due to the defendant filing a class action counterclaim. See *Progressive West Insurance*, 479 F.3d at 1014. While the Court found that CAFA did not apply because the action in question preceded the enactment of CAFA, the Court specifically held that even if CAFA applied Congress did not change the near canonical rule of *Shamrock Oil* through silence. Judge Ikuta wrote:

> Nor can we accept Progressive's invitation to read CAFA liberally as making a *sub silentio* exception to *Shamrock*. We have declined to construe CAFA more broadly than its plain language indicates. *See Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir.2006) (per curiam). "Faced with statutory silence ..., we presume

> that Congress is aware of the legal context in which it is legislating." *Id.* at 683-84. This presumption is especially appropriate here, where "[t]he legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule" that a state plaintiff forced to defend on the basis of a cross-complaint is without authority to remove. *See id.* at 684." See *Progressive West Insurance*, 479 F.3d at 1018.

An examination of the origin and evolution of the definition of "defendant(s)" in the removal statute establishes that "defendant" means the original named defendant(s) and not a plaintiff/counterclaim-defendant. This principle of federal jurisdiction was first established in 1867 when the Supreme Court interpreted the term "defendant" contained in the first removal statute as meaning the original named defendant and not a plaintiff that subsequently becomes a counterclaim-defendant. See *West v. Aura City*, 73 U.S. 139, 142 (1867) ("The right of removal is given only to a defendant who has not submitted himself to that jurisdiction, not to an original plaintiff in a state court who, by resorting to that jurisdiction, has become liable under the state laws to a cross-action."). This principle became further embedded in the law of removal jurisdiction after Congress expanded removal jurisdiction to permit either a plaintiff or defendant to remove when Congress amended the removal statute substituting the phrase "either party" for the term "defendant"[3] and then later

3. Act of Mr. 3 1875 ch. 137 §2, 18 Stat. 470 (1875) (permitting removal by "either party, or any one or more to the plaintiffs or defendants...").

reversed this amendment by substituting the phrase "defendant or defendants" in the Act of 1887 for the phrase "either party"[4]. The phrase "defendant or defendants" eventually migrated into 28 U.S.C. §71 which was the immediate predecessor of the current removal statute, 28 U.S.C. 1441(a). See *Shamrock Oil*, 313 U.S. at 104-05, 61 S.Ct. at 870-71, 85 L.Ed. 1214.

In the *Shamrock* decision, this Supreme Court confirmed that the term "defendant(s)" contained in the removal statute, 28 U.S.C. §71, means exactly what is says and empowered only the original named defendant(s) with the right to remove even if a jurisdictionally sufficient counterclaim is filed. See *Shamrock Oil*, 313 U.S. at 106-07, 61 S.Ct. at 871-72, 85 L.Ed. 1214. This Supreme Court found of "controlling significance" to the fact that Congress not only knew it could expand removal jurisdiction to include plaintiffs by substituting the phrase "either party" for the term "defendant(s)" in the removal statute, and actually did so previously in an amendment to the removal statute. See *Shamrock Oil*, 313 U.S. at 106-07, 61 S.Ct. at 871-72, 85 L.Ed. 1214. The Court reasoned that Congress chose to authorize removal by only "defendant(s)" and not counterclaim-defendants because it drafted the term "defendant(s)" into 28 U.S.C. §71 knowing that the Supreme Court in *West* had previously construed the term as excluding a plaintiff/counterclaim-defendant.[5]

4. Act of Mr. 3 1887 ch. 373 §2, 24 Stat. 552, 553 (1887).

5. It is a well established principle of statutory interpretation that Congress is presumed to know the law and judicial interpretations of words used in statutes. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 792, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (noting the "presumption that Congress

(Cont'd)

See *Shamrock Oil*, 313 U.S. at 106-07 61 S.Ct. at 871-72, 85 L.Ed. 1214. This Supreme Court concluded that "if Congress intended to reject the construction this Court had placed" on the term "defendant(s)" in *West*, then "we can hardly suppose that it would have failed to use some appropriate language to express that intention." See *Shamrock Oil*, 313 U.S. at 107, 61 S.Ct. at 872, 85 L.Ed. 1214. The exact same reasoning applies in this case; if Congress wished to allow a counterclaim-defendant to remove a class action it could have used appropriate language to express that intention.

To get around the principle that Congress is presumed to know the state of the law that it seeks to amend, First Bank makes the argument that the legislative environment when Congress enacted CAFA is distinguishable from the legal environment when Congress previously amended the removal statutes during the time of *West* and *Shamrock*. First Bank argues that because Congress was expanding federal jurisdiction when it enacted CAFA, the courts should assume that this also included adding counterclaim-defendants to the realm of parties capable of removing a lawsuit to federal court. As Judge Easterbrook wrote:

> By using a word with an established meaning, Congress produces the established result. See, e.g., *Nken v. Holder*, — U.S. ——, 129

(Cont'd)
was aware of [prior] judicial interpretations [of a statute] and, in effect, adopted them"); and *United States v. Martin*, 128 F.3d 1188, 1192 (7th Cir. 1997) (in construing amendments to a statute, a court presumes that Congress was aware of judicial interpretations of the statute).

S.Ct. 1749, 1759, 173 L.Ed.2d 550 (2009); *Whitfield v. United States*, 543 U.S. 209, 216, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005). See also *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir.2005) (applying this approach to the 2005 Act). Giving legal words their standard legal meaning spares judges and lawyers expensive tours through the legislative history and avoids the impossible task of trying to guess what Members of Congress may have "had in mind" or "intended" about statutory language. See *Hor v. Gonzales*, 400 F.3d 482, 484-85 (7th Cir.2005). Doubtless First Bank is right to say that exempting counterclaims from § 1453 means that the 2005 Act achieves less than it otherwise would, but "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (emphasis in original). Congress enacted a *rule* allowing removal by "defendants"; it did not say anything similar to: "Courts may allow removal whenever the case involves a large, multi-state class action." See *First Bank*, 552 F.3d at 917-18.

It is clear from over a century of court precedence that the word "defendant(s)" in the removal context refers to the original named defendant(s). As this Supreme Court has stated "[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants . . ." *Exxon Mobil Corp. v. Allapattah Services,* 545 U.S. 546, 558, 125 S.Ct. 2611, 2620, 162 L.Ed.2d 502 (2005). Under the textualist approach, the plain meaning of the terms of a statute is to be applied without "speculat[ing] upon Congressional motives". *Reigel v. Medtronic, Inc.*,552 U.S. 312, 327, 128 S.Ct. 999, 1009, 169 L.Ed.2d 892 (2008). In applying CAFA, the Seventh Circuit Court of Appeals correctly followed a clear textual directive and held that §1453(b) does not change the common and understood meaning of the word "defendant" in the removal provisions.

First Bank's argument that the legal and legislative environment and policies that were key rationales for the Supreme Court's holding in *Shamrock* are somehow different than those leading to the passage of CAFA is misguided. Contrary to First Bank's argument, the Supreme Court's decisions in *West* and *Shamrock* were not based on ephemeral legal and legislative environment and policies, but were based upon the clear textual directive of the removal statutes and the judicially settled meaning of the term "defendant(s)" contained in the removal statutes. In addition, the Supreme Court in *Shamrock* relied upon the Congressional view that it was just and proper to require a plaintiff to abide by his selection of a forum. See *Shamrock Oil*, 313 U.S. at 106-07, 61 S.Ct. at 871-72, 85

L.Ed. 1214.[6] Although First Bank's Complaint pleads diversity jurisdiction, First Bank voluntarily filed its action in state court. Under the decisions of *West* and *Shamrock* and in accordance with the Congressional view, it is fair to require First Bank to abide by its selected forum.

First Bank, recognizing the weakness of its argument, attempts to ballast its argument with the "Findings" provision of CAFA. The references to CAFA "Findings" and the intent of Congress constitute pure speculation. The "Findings" provision of CAFA has been found not to be a clear textual directive for courts to alter or abolish long established principles of federal jurisdiction such as only an original defendant may remove. See *Morgan v. Gay,* 471 F.3d 469, 473 (3d Cir. 2006) (opining that courts should not consider CAFA's findings and purposes as evidence of Congress's intent to alter traditional rule of federal jurisdiction if there is no textual directive to do so). In the end the references to the CAFA "Findings" constitutes speculation on what Congress intended with CAFA. As the majority in *Palisades* appropriately put it:

> . . . although we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA, we also recognize that it is our duty, as a court of law, to interpret the statute as written, not to rewrite it as

6. The Court quoted the Congressional view from H.R. Rep. No. 1078 at 1 (1st Sess. 1887) wherein Congress echoed the Court's conclusion expressed in *West* that if a plaintiff "elects to sue in a State court when he might have brought his suit in a Federal court there would...be...no good reason to allow him to remove the cause."

> ATTM believes Congress *could have* intended to write it. If Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a 'defendant' may remove and that 'defendant' in the context of removal means only the original defendant, it should have plainly indicated that intent. *Palisades*, 552 F.3d at 336.

When one considers that the word "defendant(s)" in removal context has been uniformly interpreted as original defendant(s) for over a century, the reality that Congress is presumed to know the judicial interpretation of "defendant", the fact that the text has meaning by eliminating the home state and unanimous consent of all defendants barriers to removal, and that Congress has drafted other removal statutes that clearly expand removal beyond just the original defendant(s), the logical conclusion is that if Congress intended to change the longstanding definition of "defendant(s)" in the removal context it would have done so in a clear and unequivocal text. To conclude otherwise is speculation as to what Congress intended.

B. There Is No Basis to Grant a *Writ of Certiorari*.

Petitioner acknowledges that the sole basis for this Supreme Court to grant its Petition for a *Writ of Certiorari* rests with Supreme Rule 10(c) which states: "A state court of United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

conflicts with relevant decisions of this Court." See Supreme Court Rule 10(c). In this case First Bank does not cite a contrary decision of any court to the Seventh Circuit opinion. As such the sole basis for granting the petition is that the issue presented represents ". . . important question of federal law that has not been, but should be, settled by this Court . . ." See Supreme Court Rule 10(c). Contrary to First Bank's assertion this matter does not raise an issue of national importance that has not been settled.

In its Petition for a *Writ of Certiorari* First Bank makes the argument that if the consensus opinion of the Circuit Courts of Appeals stands then a "loophole" to CAFA jurisdiction will be created and raises the specter that if original plaintiff/counterclaim-defendants are not permitted to remove counterclaims then CAFA jurisdiction will become meaningless. First Bank's argument is disingenuous as to its compulsion to file suit in state court and its argument that counterclaims will swallow CAFA jurisdiction is not borne out.

First Bank voluntarily elected to sue in state court in order to foreclose property and to collect on commercial guaranties. At all times there was complete diversity between First Bank and the defendants. As such First Bank could have chosen to file suit in federal court but elected to purse the action in state court. CAFA may be intended to increase access to federal courts in class actions but it does nothing to allow a bank to sue in one forum when it serves its purposes and remove the same case when the bank decides the forum no longer serves its purposes. Further, the specter of counterclaims swallowing CAFA jurisdiction is not reasonable. The only time when the counterclaim would

be applicable is an action wherein the counterclaim-defendant voluntarily elected to pursue a claim in state court as opposed to federal court. If the state court is good enough to sue to enforce one's right then it should be good enough to be sued. The vast majority of times the counterclaim defendant would have a choice of forum, i.e. state or federal.

Even with the specter of counterclaims swallowing CAFA, First Bank still needs some evidence on its side. Without evidence on its side First Bank engages in pure speculation. First Bank cites no empirical evidence for its assertion that counterclaims will swallow CAFA. This speculation cannot defeat the reality that Congress knew the judicial interpretation of the term "defendant" and adopted this definition when it drafted the term "defendant(s)" into §1453(b). See *Faragher v. City of Boca Raton*, 524 U.S. 775, 792, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (noting the "presumption that Congress was aware of [prior] judicial interpretations [of a statute] and, in effect, adopted them"). Even if there is evidence of counterclaims being used to evade CAFA that is an issue for the legislature and not for the courts to speculate as to the intent of Congress. The speculation engaged by First Bank is contrary to the historical fact that Congress has used different terms other than "defendant(s)" when it wanted to expand removal jurisdiction beyond the originally named defendant(s).[7] In this instance Congress had over a

7. See, e.g., *Shamrock* which discusses the substitution of the phrase "any party" for "defendant" when Congress expanded removal jurisdiction to include the plaintiff; See also, 28 U.S.C. §1452(a) (allowing "[a] party" to remove certain cases within the federal court's bankruptcy jurisdiction); 12 U.S.C. §1789(a)(2) (providing the Nat'l Credit Union Admin. Bd. the right to removal without regard to whether it is an original named defendant).

century of judicial interpretation of "defendant" in the removal provisions and failed to draft language to change that definition. To conclude that Congress, armed with that historical knowledge, really wanted to expand the definition of "defendant" in the removal provisions but failed to clearly do so in the text constitutes pure speculation.

CONCLUSION

The Seventh Circuit Court of Appeals did not err in holding that First Bank as a plaintiff/counterclaim defendant did not have the right to remove this matter to federal court. First Bank's Petition for a *Writ of Certiorari* should be denied.

Respectfully Submitted,

BERNARD YSURSA
Counsel of Record
12 West Lincoln Street
Belleville, Illinois 62220
618-235-3500
bjy@cooklawoffice.com

THOMAS R. YSURSA
5111 West Main Street
Belleville, Illinois 62226
618-235-0020

Counsel for Respondent, DJL Properties, LLC

September 2010

APPENDIX A

28 U.S.C. §1447 provides in pertinent part:

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

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(3)

Supreme Court, U.S.
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No. 10-137

IN THE

Supreme Court of the United States

FIRST BANK,

Petitioner,

v.

DJL PROPERTIES, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO NEW POINTS RAISED IN THE BRIEF IN OPPOSITION FOR RESPONDENT DJL PROPERTIES, LLC

GORDON R. BROOM
Counsel of Record
TROY A. BOZARTH
W. JASON RANKIN
HEPLERBROOM LLC
103 W. Vandalia St., Ste. 300
Edwardsville, IL 62040
618-656-0184
grb@heplerbroom.com

Counsel for Petitioner

232687

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RULE 29.6 STATEMENT

The corporate disclosure statement included in the Petition for Writ of Certiorari remains accurate.

INTRODUCTION

In its Brief, Respondent DJL Properties, LLC, raises two new points in opposition to the Petition for a Writ of Certiorari. First, Respondent mistakenly contends that this Court does not have jurisdiction to review remand orders under 28 U.S.C. § 1453(c)(1). Second, Respondent argues that the question presented, whether *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a class action counterclaim under the Class Action Fairness Act, 28 U.S.C. § 1453(b), is somehow rendered to be not one of national importance merely due to a venue selection clause contained in the loan documents executed by Petitioner and Respondent. As is demonstrated below, both points are without merit.

ARGUMENT

I. In *The Hertz Corporation v. Friend*, this Court Specifically Rejected Respondent's Contention that this Court does not have Jurisdiction to Review a Remand Order Under 28 U.S.C. § 1453(c)(1).

Respondent argues that the language of § 1453(c)(1) only confers the right to review a remand order on a circuit court of appeals, and because this statute does not explicitly mention the Supreme Court by name, this Court does not have jurisdiction to entertain the pending Petition. However, this very argument was summarily rejected earlier this year by this Court in *The Hertz Corporation v. Friend*, 130 S. Ct. 1181 (2010). For the same reasons, this point should also be rejected in this case.

In *Friend*, the respondent similarly asserted that this Court lacks jurisdiction under § 1453(c) because the statute only permits appeals of remand orders to "courts of appeals." *Friend*, 130 S. Ct. at 1187. The respondent argued that because the statute does not explicitly list the "Supreme Court" in its text, this Court does not have jurisdiction to consider an appeal from a remand order. *Id.* The Supreme Court rejected this contention, reasoning:

> This argument, however, makes far too much of too little. We normally do not read statutory silence as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants. *Felker v. Turpin*, 518 U.S. 651, 660-661, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996); *Ex parte Yerger*, 75 U.S. 85, 8 Wall. 85, 104-105, 19 L. Ed. 332 (1869). Here, another pre-existing federal statute gives this Court jurisdiction to "revie[w] . . . [b]y writ of certiorari" cases that, like this case, are "in the courts of appeals" when we grant the writ. 28 U.S.C. § 1254. This statutory jurisdictional grant replicates similar grants that yet older statutes provided. *See, e.g.*, § 1254, 62 Stat. 928; §1, 43 Stat. 938-939 (amending § 240, 36 Stat. 1157); § 240, 36 Stat. 1157; Evarts Act, § 6, 26 Stat. 828. This history provides particularly strong reasons not to read § 1453(c)'s silence or ambiguous language as modifying or limiting our pre-existing jurisdiction.

Friend, 130 S. Ct. at 1187. Thus, this Court specifically found that § 1453(c) does not deprive the Supreme Court of jurisdiction to review remand orders. *Id.*

Here, for the same reasons as stated by this Court in *Friend*, Respondent's assertion that this Court does not have jurisdiction to consider the Petition for a Writ of Certiorari should be rejected.

II. The Venue Selection Clause is not a Valid Basis for the Denial of the Petition for a Writ of Certiorari.

A venue selection clause that was initially entered into by the Petitioner and the Respondent at the time of the loan is no basis to deny this Petition for a Writ of Certiorari. The venue selection clause quoted by Respondent provides, "If there is a lawsuit, [Borrower] [Grantor] [Guarantor] agrees upon Lender's request to submit to the jurisdiction of the courts of St. Clair County, State of Illinois." Respondent contends that because the Petitioner chose to bring its foreclosure action against the Respondent in state court, it should be required to defend in state court any multi-state class action counterclaims filed against it. *See* Opposition, p. 17. This argument fails for a number of reasons.

First, while the Petitioner may have agreed to venue in state court for the resolution of a dispute between the lender and this specific borrower, it never agreed to litigate in state court a multi-state class action counterclaim. Second, the venue selection clause that was entered into between the Respondent and the

Petitioner may not have even been agreed to by all members of the putative class, who reside in multiple states.

Moreover, there are countless disputes that could involve class action counterclaims where no venue selection clause would be at issue. Accordingly, the existence of the venue selection clause in this isolated case in no way detracts from the necessity for this Court to issue a determinative interpretation of § 1453(b) for all types of class action counterclaims. The question whether a counterclaim defendant may remove a qualifying class action under CAFA is a recurring issue of national importance that will arise irrespective of the existence of a forum selection clause.[1]

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1. In a related argument, Respondent states, "The vast majority of times the counterclaim defendant would have a choice of forum, i.e. state or federal." Thus, the argument goes, if a plaintiff chooses a state forum for its litigation, it should be deemed to have agreed to a state forum for any class action counterclaims, even class action counterclaims that have no relation to the original complaint, as can be the case in Illinois. *See* Opposition, p. 18. Of course, this contention is completely without merit in that there are a multitude of disputes that cannot be brought in federal court due to the fact that diversity or the amount in controversy is lacking.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GORDON R. BROOM
Counsel of Record
TROY A. BOZARTH
W. JASON RANKIN
HEPLERBROOM LLC
103 W. Vandalia St., Ste. 300
Edwardsville, IL 62040
618-656-0184
grb@heplerbroom.com

Counsel for Petitioner